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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944
No. 825

HENRY HAWK, PETITIONER,

V.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
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For Respondent.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
For Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

This case involves an application for a writ of habeas corpus made to the District Court of Lancaster County,

Nebraska. The petition was dismissed without the issuance of a writ and an appeal taken to the Supreme Court of Nebraska; where the action of the lower court was affirmed. *Hawk* v. *Olson, Warden,* — Neb. —, 16 N. W. (2d) 181. Petitioner has now made application to this court for a writ of certiorari to the Supreme Court of Nebraska.

NATURE AND STATEMENT OF THE CASE.

The petitioner, Henry Hawk, filed his petition in the District Court of Lancaster County, Nebraska, to secure a release from the Nebraska State Penitentiary by means of a writ of habeas corpus. Included in the petition is a certified copy of the judgment of the District Court of Douglas County, Nebraska, sentencing the petitioner to confinement in the Nebraska State Penitentiary for the term of his natural life.

Since his incarceration in the Nebraska State Penitentiary, petitioner has filed numerous applications for writs of habeas corpus; to use his own words, he has "* * * by petition complained to this court and every court in the land * * *." Some of these applications are referred to in the petition and reported opinions were had in the following cases: *Hawk* v. *O'Grady, Warden,* 137 Neb. 639, 290 N. W. 911; *Hawk* v. *Olson, Warden,* 130 Fed. (2d) 910; *Ex parte Hawk,* 64 Sup. Ct. 448, 321 U. S. 448; *Hawk* v. *Olson, Warden,* — Neb. —, 16 N. W. (2d) 181.

The district court denied the petition without a hearing on the grounds that (1) the petition does not state facts sufficient to constitute a cause of action, and (2) all

of the allegations, facts and issues presented by the petition had been duly alleged, presented and fully adjudicated between the petitioner and the respondent, and his predecessor in office, in previous actions filed by petitioner in said court. The opinion of the district court (R. 52-55) is as follows:

"This matter comes before the court upon the petition for writ of habeas corpus, affidavit of poverty and motion for order allowing subpoena of and summons of witnesses without prepayment of fees and costs, and the motion for an order to amend said petition, all filed by the petitioner herein, and the court, having fully and carefully examined said petition and motions and the documents attached thereto, finds that said petition does not state facts sufficient to constitute a cause of action in favor of petitioner and against the respondent; and that, accordingly, the said petition should be dismissed for want of merit and for failure to state a cause of action, and said writ of habeas corpus prayed for in said petition denied.

"And the court further finds from an examination of said petition and motions, and from the records of this court, that the issues presented for determination in said petition have been heretofore fully and finally adjudicated between the petitioner herein and the respondent herein and the latter's predecessor in office in a similar action filed by petitioner in this court, being Docket V-98 of this court, which said action was dismissed by this court, and was thereafter appealed by petitioner to the Supreme Court of the State of Nebraska, being No. 30708 in said court, and said judgment in said action having been affirmed in said appeal by the Supreme Court of Nebraska by opinion published, 137 Neb. 639, which decision of the Supreme Court of this state

remains unreversed and unmodified, with petition for writ of certiorari in said case denied in the Supreme Court of the United States, Hawk v. O'Grady, 311 U. S. 645, 61 Sup. Ct. 11, 85 L. Ed. 412.

"The court further finds from an examination of said petition and the records of this court that all of the allegations, facts and issues, presented by plaintiff in said petition now before the court have been duly alleged, presented and fully adjudicated between this petitioner and the respondent herein, and his predecessor in office, in a previous action filed by said petitioner in this court, being numbered Docket W, pg. 124 in this court, wherein petitioner petitioned for a writ of habeas corpus, alleging the same grounds and facts and presenting the same identical issues and all of them as are now presented and alleged in the petition now under consideration of this court, and that all of said issues have been fully and finally adjudicated between said parties and adversely to said petitioner, being the petitioner herein, in said action, in which said petition for habeas corpus of the petitioner was dismissed by this court by the following order, to-wit: '18 District Court Journal "158" Lancaster County Nebraska September Term, 1941, October 28, 1941, Thirty-eighth Judicial Day. Tuesday Court met pursuant to adjournment of Monday, October 27, 1941. Present the same officers of the Court as on Monday, the 27th inst. And on this day the following proceedings were had and done: Before the Honorable FRED SHEPHERD, Judge Presiding. Henry Hawk, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, W-124. This case was on the 28th day of October assigned to me, Fred Shepherd, one of the judges of the District Court of the Third Judicial

District of Nebraska by J. H. Broady, the assignment or presiding judge of said court for the present year. The Court finds upon examination of the petition and record together with the brief attached thereto, and from a careful consideration of the same that said petition does not state facts sufficient to constitute a cause of action in favor of the petitioner and relator and against the respondent; and that accordingly the said petition should be dismissed at the costs of said petitioner and relator, taxed at $——, for which execution is hereby awarded. And the Court finds in the second place that this is a cause adjudicated, the precise case under the same title concerning the identical persons and covering the same subject matter having been considered by this court under its then docket number V-98 of this court and therein dismissed, and having soon thereafter been considered on appeal in the Supreme Court of Nebraska in No. 30708 of its cases and that the judgment of this court was therein affirmed with opinions published in Vol. 137 of the Nebr. Report at page 639, which decisions of the State Supreme Court remains unreversed and unmodified, with petition for writ of certiorari denied in the Supreme Court of the United States and this court further finds that in consequence of the foregoing the above entitled case should be dismissed as a case heretofore dismissed in all the courts in the direct proceeding at the costs of the petitioner and relator. Wherefore, the Court so dismisses the petition as a cause adjudicated at the costs of petitioner and relator, taxed at $——, for which execution is hereby awarded. To the above dismissal, whether on grounds of res adjudicata or because the petition fails to state a cause of action, and to all of the findings the petitioner and relator duly excepts and his exceptions are duly noted. Motion of petitioner

that date be set for hearing is overruled by the Court for the reasons indicated in the dismissal of the petition, to which petitioner and relator duly excepts.'

"That said previous judgment of this court dismissing the petition for writ of habeas corpus of this petitioner in said previous action, Docket W-124, was not appealed, because final, and is in full force and effect and constitutes a full and complete and final adjudication of all rights, claims, issues and contentions of the petitioner herein presented by the petition now filed and under consideration wherein petitioner prays for the issuance of a writ of habeas corpus.

"IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT that the petition in this action be and hereby is dismissed, and the writ of habeas corpus prayed for by said petitioner be and
7 hereby is denied, all at the costs of petitioner taxed at $——, for which execution is hereby awarded.

"Signed at Lincoln, Nebraska, this 29th day of March, 1944.

"By the Court,

"Ralph P. Wilson,
"District Judge."

From the judgment of the district court, petitioner appealed to the Supreme Court of Nebraska. The Supreme Court of Nebraska sustained the lower court in an opinion filed on the 3rd day of November, 1944 (*Hawk* v. *Olson, Warden*, — Neb. —, 16 N. W. (2d) 181). From this judgment of the Supreme Court of Nebraska, petitioner now seeks to secure a writ of certiorari from this court.

We have carefully examined the petition, together with the record submitted in support of the petition and the grounds which he asserts entitle him to the writ we have summarized as follows:

1. Petitioner was deprived of effective assistance of counsel.

2. That his conviction was based upon perjured testimony, to the knowledge of the trial judge and prosecuting officer.

3. The evidence was insufficient to support a conviction.

4. Error in the instructions given by the court.

5. Petitioner was denied an appeal to the Supreme Court of Nebraska.

6. That at the time of his trial he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas; that after his conviction he was transferred to Alcatraz Penitentiary and upon completion of his term was turned over to the Nebraska authorities, who placed him in the State Penitentiary.

7. That his trial was by ordeal and mobocracy.

In our argument herein, we will consider each of these grounds and review the allegations set forth with reference to each of these charges.

SUMMARY OF POINTS AND ARGUMENT.

Point A. An application for a writ of habeas corpus must state facts sufficient to show that petitioner is entitled to the writ, and, where the facts alleged, if proven, would be insufficient to warrant the issuance of the writ the petition should be dismissed.

Point B. A charge that the evidence was insufficient to sustain a conviction does not present a federal question, since the due process clause does not imply a guarantee against an erroneous decision of a state court.

Point C. The fact that a defendant in an information is imprisoned, serving a sentence for another crime, gives him no immunity from prosecution.

Point D. In an application for a writ of habeas corpus petitioner must allege facts sufficient to entitle him to the writ, mere conclusions being insufficient.

Point E. The application for a writ of certiorari should be denied, since all of the allegations of the petition together fail to disclose a denial of due process.

ARGUMENT.

Point A.

An Application for a Writ of Habeas Corpus Must State Facts Sufficient to Show that Petitioner is Entitled to the Writ, and, where the Facts Alleged, if Proven, Would be Insufficient to Warrant the Issuance of the Writ the Petition Should be Dismissed.

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that on February 11, 1936, he was arraigned in the Municipal Court of Omaha, Nebraska, and bound over to the District Court of Douglas County, Nebraska, "without due process of law, in that said Municipal Court Judge deprived your petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your

Petitioner to proceed without the assistance of counsel or other defense" .(R. 7).

The charge of petitioner that these facts (if true) constitute a denial of due process is without merit. In the first place, there is no evidence that petitioner ever asked for counsel, and, even had he requested such, a denial of the request would violate no constitutional guarantees. The Supreme Court of Nebraska has held that a preliminary hearing is in no sense a trial of the person accused, but is merely a course of procedure to determine whether probable cause exists to believe that a crime has been committed, and the accused discharged or held to answer as the facts warrant. *Latimer* v. *State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Van Buren* v. *State*, 65 Neb. 223, 91 N. W. 201.

In *Latimer* v. *State*, supra, the court said:

> "But the preliminary examination provided for by said section 585 of the Criminal Code is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with having committed a crime on being brought before a magistrate should be asked to plead, or enter a plea of guilty, or not guilty, to the complaint. The object of the preliminary examination is to ascertain whether the crime charged has been committed, and if so, whether there is probable cause to believe that the accused committed (In re Garst, 10 Neb. 78; State v. Robertson, 55 Neb. 41)."

Petitioner then alleges that on the same day that he was arraigned in the municipal court he was also arraigned in the district court "and was asked to enter a plea to an information of an unscrupulous County At-

torney charging him with 'Murder in the first degree while attempting to rob Isadore Perelman,'" to which information petitioner pled not guilty.

This allegation of petitioner is disclosed by the petition to be contrary to the facts, since the record discloses that petitioner was not arraigned until the 17th day of April (R. 25-26). This is also supported by the latter allegation of the petition (R. 8).

Petitioner further alleges that on the 16th day of March, 1936, he was returned to Omaha and placed in the county jail, where he was held incommunicado, except that Joseph M. Lovely, Public Defender, and J. C. O'Brien, Assistant Public Defender, visited him for about fifteen minutes at about 11:15 p. m. that night. He further states that said public officers tried to intimidate him into pleading guilty "in that on conviction by a jury petitioner would no doubt but receive a death sentence, and that the County Attorney and Fritz Franks Capitan of Decetives had framed your Petitioner to conviction by the use of two convicts that were going to testify against your Petitioner."

Petitioner complains because the public defender advised him to plead guilty because if convicted by a jury he would no doubt receive a death sentence. Under the laws of the State of Nebraska upon conviction for first degree murder it becomes the duty of the jury to fix the penalty at either death or life imprisonment. We believe it to be the duty of a defense attorney, if he believes his client guilty and fears that the jury will impose the death penalty, to so inform his client and advise him to plead guilty in order to avoid the death penalty.

While petitioner uses the word "intimidate," such advice by an attorney to his client is certainly not intimidation.

Petitioner further states that he informed these public officials that he would never plead guilty, "at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioners trial scheduled for trial the following morning" (R. 8); that on the following morning, March 17, 1936, he was arraigned in the district court and pled guilty to the charge. That he moved the trial court orally for a continuance of twenty-four hours for the purpose of "consulting counsel, examine the charge, subpoena witnesses and prepare a defense," which motion was overruled by the court (R. 9); that the court began to impanel the jury and called two or three jurymen when Joseph M. Lovely, the public defender, and John N. Baldwin, his assistant, stepped forward and entered the case "without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner." He further alleges, "Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense" (R. 9).

Petitioner's charge that the two public officials left, stating that they would have nothing to do with his trial scheduled for the next morning is shown to have no bearing in his defense. Assuming this statement to be true, such action cannot constitute denial of due process, since the record discloses that the public defender and his assistant did represent the petitioner throughout his trial and no complaint is made that they did not properly and ably represent him. The only charge as to any failure

to properly represent petitioner is the charge that they rested his case without calling as a witness Mary A. Mullen for the purpose of proving that the witness, Edward Nowicki, was a perjuror when he testified that he knew petitioner two months previous to February 22, 1934 (R. 14). The petition does not disclose what the testimony of Mary Mullen would be, but it is apparent that the most her testimony could do would be to impeach the statement of the witness Nowicki as to the length of time which he had known petitioner. From other allegations in the petition, we might infer that her testimony would be that the petitioner was incarcerated in the Iowa State Penitentiary two months prior to the date of the alleged crime. In answer to a question as to the length of time that a witness has been acquainted with another, he may very easily fix such time at a few weeks longer than was the actual case and such error certainly would not prove him a perjuror. Neither would the length of time in which he knew the petitioner Hawk be any evidence to prove or disprove Hawk's guilt. This being the only error charged against the defense attorney in the conduct of the case, it can certainly not constitute a denial of due process. The record further discloses that following the verdict the public defender filed a motion for a new trial so as to fully protect petitioner in his right to an appeal and if petitioner had made the request it would have been the duty of the public defender to prosecute an appeal to the Supreme Court of Nebraska.

PERJURED TESTIMONY.

Petitioner refers to the testimony of certain witnesses as being perjured and states that the prosecuting officials

deliberately introduced this perjured testimony. The first witnesses charged with giving perjured testimony are two doctors, and an examination of the evidence set forth in the petition (R. 10) fails to disclose any perjury and further reveals that such testimony has no direct bearing on proving the guilt or innocence of the petitioner, but was evidence introduced for the purpose of establishing the cause of the death of Isadore Perelman.

Petitioner states that the witness, Dr. C. J. Toohey, testified at the preliminary hearing that Isadore Perelman was admitted to the Lord Lister Hospital the evening of February 28, 1934, and that said witness performed an emergency operation and removed a bullet from Mr. Perelman's groin, and that at about 1:30 a. m., March 1, 1934, the said Isadore Perelman died (R. 10).

Petitioner then states that at the trial a witness, Dr. S. McCleneghan, testified that he removed a bullet from Mr. Perelman's body at the Leslie O. Moore morgue on the 1st day of March, 1934 (R. 10). This evidence, if proven to have been given, as alleged in the petition, would certainly come far short of establishing that either of said witnesses perjured themselves in giving this testimony.

The next witness whom petitioner states gave perjured testimony is Paul DeSanti (R. 10-11). While petitioner states that the prosecution threatened to prosecute the witness on charges pending against him unless he gave testimony favorable to the state, as he did at the preliminary hearing, there are no facts set forth to support this allegation. Petitioner further states that the state impeached this witness, from which statement we can

only conclude that at the time of the trial the witness changed his story from that told at the preliminary hearing and gave testimony favorable to the petitioner. Under such a situation, certainly the state was entitled to impeach this testimony by showing his previous inconsistent statements and such evidence would not be evidence to either prove or disprove the guilt of the petitioner, but would merely be evidence going to the credibility of the witness.

Petitioner makes reference to some further testimony of the witness DeSanti which he himself states is "without and beyond the record but not inconsistent therewith." This testimony apparently had to do with the publication of a newspaper on the evening of February 28, 1934, and with the length of time previous to February 28, 1934, that the petitioner had been a guest at the witness' "bootleg joint."

Petitioner next asserts that the testimony of Edward Nowicki was perjured. A part of this witness' testimony is set forth in the petition (R. 12) in quotations, but it is apparent that it is not a direct quotation, but merely the statement of the petitioner. This statement is as follows:

> "That your Petitioner at all times was with he and Paul Taylor, during the attempted robbery and shooting of Isadore Perelman, the evening of February 28, 1934, and that the robbery was attempted at about 8 P. M. o'clock, and after the robbery and shooting of Isadore Perelman the three of us got in the car and driven away, and latter on at about nine o'clock the same evening the three of us returned to Paul DeSanti's bootleg joint and that while there an extra newspaper came out giving the account of the

attempted robbery and shooting of Isadore Perelman, and that previous to February 28, 1934, he had known your petitioner probably two or three months. He further testified that he was an inmate of the Nebraska State Penitentiary held in the County jail at the time of giving his testimony."

Petitioner sets forth (R. 12) that the source of his knowledge and ground for believing that this evidence is perjured is because it is uncorroborated and contradicted by the testimony of the witness Paul Taylor. Petitioner also makes the assertion that this witness was bribed and that such bribery will be proved by the subpoenaing of witnesses and introduction of evidence. No statement is made, however, as to who the witnesses are or what their testimony will be.

Petitioner then attempts to discredit the testimony of this witness by the statement that he "was a felon with a prison record dating back 12 years that he had served time in every penal institution in the State of Nebraska." In this connection, we might suggest that the record of petitioner far surpasses that of this witness. Even limiting this observation to the record he has not only served time in the penal institutions of Nebraska, but those of Iowa, as well as the federal penitentiaries at Leavenworth and Alcatraz. The rule that conviction of a felony may be considered as affecting the credibility of a witness may well be applied to the petitioner in this case.

If we are to determine which one of the two witnesses, Edward Nowicki or Paul Taylor, gave the perjured testimony, we believe that it must be determined in favor of Paul Taylor, who, at the preliminary hearing, testified that petitioner was an accomplice in the perpetration of

the crime, but changed his story at the time of the trial after he himself had pled guilty to being an accomplice and was serving his sentence in the Nebraska State Penitentiary. The testimony of Paul Taylor was impeached by showing his previous inconsistent statements at the time of the preliminary hearing, and also through the testimony of Fred Franks (R. 13) it was shown that he had given previous inconsistent statements to the prosecuting attorney and his assistant.

The question was one for the jury to determine which witness should be believed and apparently from their verdict they believed the witness Nowicki when he stated that the petitioner, Henry Hawk, was a party to the crime.

Point B.

A Charge That the Evidence was Insufficient to Sustain a Conviction Does Not Present a Federal Question, Since the Due Process Clause Does Not Imply a Guarantee Against an Erroneous Decision of a State Court.

Petitioner refers to certain other witnesses (R. 13-14) apparently for the purpose of showing that the evidence was insufficient to sustain a conviction. While we contend that this is a matter that cannot be raised in a habeas corpus proceedings, if any such charge is to be made it certainly becomes necessary for the petitioner to make all of the testimony a part of his petition. The Bill of Exceptions was in his possession, as disclosed by his petition (R. 14), wherein he states, "your petitioner will if necessary produce the bill of exceptions at the time of the hearing of this case and he now has said bill of exceptions in his possession." This Bill of Ex-

ceptions has been attached to and made a part of the petition in many of the applications made by petitioner in the past (see opinion in *Hawk v. Olson, Warden*; 130 Fed. (2d) 910). Petitioner should not be given greater rights because he is withholding this evidence from the court than he could secure when all of the facts were presented. A reading of the entire testimony disproves the claim of petitioner not only as to his contention with reference to the sufficiency of the evidence but also his contention of perjured testimony. If any part of this record is to be relied upon, the entire record should be made a part of this petition.

ERROR IN THE INSTRUCTIONS.

A complaint is made as to the instructions given by the court to the jury. However, an examination of these instructions (R. 27-32, inc.) discloses that they are the customary instructions given in a first degree murder case; that they correctly state the law of Nebraska and fully protect the rights of the defendant. Further, this is a matter which is not reviewable on habeas corpus. Neither is it a matter which may be inquired into on certiorari to this court, it being entirely a matter of procedure which has been determined adversely to petitioner by the Nebraska court.

However, neither the insufficiency of the evidence nor the alleged error in the instructions given by the trial court present a federal question. The petitioner has been fully heard in the regular course of judicial proceedings in the courts of the State of Nebraska and the due process clause implies no guarantee against an erroneous decision of a state court. *Central Land Company v. Laidley*, 16 Sup. Ct. 80, 159 U. S. 103, 40 L. Ed. 91;

Fillet v. *Steele*, 36 Sup. Ct. 550, 241 U. S. 648, 60 L. Ed. 1220; *Frank* v. *Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582.

Point C.

The Fact that a Defendant in an Information is Imprisoned, Serving a Sentence for Another Crime, Gives Him No Immunity From Prosecution.

Hawk v. *Olson, Warden*, — Neb. —, 16 N. W. (2d) 181.

Ponzi v. *Fessenden*, 258 U. S. 254, 42 Sup. Ct. 309, 312, 66 L. Ed. 607, 22 A. L. R. 879.

Rigor v. *State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719.

Cato v. *Smith*, 104 Fed. (2d) 885.

Kelley v. *Oregon*, 273 U. S. 589, 47 Sup. Ct. 504, 71 L. Ed. 790.

Kite v. *Commonwealth*, 11 Metc. (Mass.) 581, 585.

Thomas v. *People*, 67 N. Y. 218, 226.

Another point raised by petitioner is that at the time of his trial he was a prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and was brought to Omaha in the custody of federal officers. Following his conviction, he was returned to the penitentiary at Leavenworth and later transferred to Alcatraz (R. 16). Upon the completion of his sentence in the federal penitentiary, petitioner was delivered to the authorities at Oakland, California, who returned him to Nebraska and placed him in the Nebraska State Penitentiary. By this, petitioner alleges that he was "kidnaped and committed to the Nebraska State Penitentiary" (R. 17-18).

This contention of petitioner is fully answered by the Nebraska Supreme Court in their opinion in *Hawk* v. *Olson*, 16 N. W. (2d) 181, as follows:

> "The petition states that he was brought to Omaha for trial by the federal authorities and then returned by them to the federal prison; and that when his term in the federal penitentiary expired the federal authorities turned him over to the state authorities. As stated in Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 312, 66 L. Ed. 607, 22 A. L. R. 879: '* * * the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. * * * "The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."' As stated in Rigor v. State, 101 Md. 465, 61 A. 631, 4 Ann. Cas. 719: 'That accused is serving a sentence under a prior conviction of a distinct crime is no ground for postponing his trial until the expiration of such sentence.' See, also, Cato v. Smith, 9 Cir., 104 F. (2d) 885; Kelley v. Oregon, 273 U. S. 589, 47 S. Ct. 504, 71 L. Ed. 790. And in Ponzi v. Fessenden, supra: 'Nor, * * * is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite v. Commonwealth, 11 Metc. (Mass.) 581, 585, an opinion by Chief Justice Shaw, Ex parte Ryan, 10 Neb. 261; Thomas v. People, 67 N. Y. 218, 226.'"

Point D.

In an Application for a Writ of Habeas Corpus Petitioner Must Allege Facts Sufficient to Entitle Him to the Writ, Mere Conclusions Being Insufficient.

Tail v. *Olson*, 145 Neb. —, 16 N. W. (2d) 226.

ORDEAL AND MOBOCRACY.

This leaves for consideration the charge that "said commitment, trial and conviction were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Consitution of the United States" (R. 6).

Funk & Wagnalls Dictionary defines ordeal as, "a mediaeval form of judicial trial wherein supernatural aid was invoked in the place of evidence, as in trial by fire, water or battle," and, mobocracy is defined as, "lawless control of public affairs by the mob or populace." Nowhere in the record do we find any allegations of fact which would tend to show that petitioner was convicted because of a trial either by fire, water or battle. Nor do we find any allegations that would show, or even imply to the least degree, that his trial was controlled by the mob. So far as the record discloses, no one was present at the trial except the officers of the court, prosecution and defense attorneys, the jury and the witnesses. Every allegation of fact with reference to the trial points to the utter falsity of this charge, since it demonstrates a trial according to the regular rules of procedure of Nebraska, an information in due form was filed, witnesses were called who were examined and cross-examined, the jury was properly instructed by the court and the cause submitted to them, and, following deliberation, a verdict of guilty returned against the petitioner.

Further, is there no presumption of regularity in the proceedings of our trial courts? Have our trial courts come into such disrepute that whenever a convicted felon charges them with dishonesty, unfairness, etc., unsup-

ported by any allegations of fact, the judge of the court must be called to the witness stand to defend his honesty and integrity?

Must a hearing be had on these charges and the state put to the expense of bringing to Lancaster County, Nebraska, the trial judge, the prosecuting attorneys, defense attorneys, court reporters and all other officials who have anything to do with this trial in order to disprove these charges which are unsupported by any statement of fact? Must these proceedings be repeated every few months whenever Mr. Hawk sees fit to make a new charge of a denial of due process of law?

We believe that society, as well as the defendant, is entitled to due process of law in a criminal prosecution. While there is a presumption of innocence of a person charged with a crime, such presumption should continue only until such person has been convicted and thereafter certainly the courts are entitled to a presumption of regularity in their proceedings and the burden should be placed upon the defendant to allege and prove any charges of irregularity. Before a hearing must be had he should be required to state his charges through allegations of fact and not mere conclusions, and, certainly in a case such as the instant one, where all of the allegations of fact disprove the charges made, the petitioner is not entitled to a hearing.

Point E.

The Application for a Writ of Certiorari Should be Denied, Since All of the Allegations of the Petition Together Fail to Disclose a Denial of Due Process.

Ordinarily "law, in its regular course of administration through courts of justice is due process, and when

secured by the law of the state, the constitutional requisition is satisfied." *Caldwell* v. *Texas*, 137 U. S. 691, 11 Sup. Ct. 224, 34 L. Ed. 816. And due process is so secured by laws operating on all alike and not subjecting an individual to the arbitrary exercise of the powers of government.

In *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252, this court has said that an asserted denial of due process "is to be tested by an appraisal of the totality of facts in a given case."

In *Frank* v. *Mangum*, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 it was contended that the "due process" clause was violated in a Georgia murder prosecution. The opinion is quite long, but the following portion is applicable. On page 979 of the L. Ed., the court said:

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (Citing cases.)"

All the 14th Amendment guarantees, so far as state procedure is concerned, is notice, an opportunity to be heard, and a trial which does not violate fundamental principles of fairness.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 595, it was said:

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. Ed. 97, 109, 111, 112, 29 S. Ct. 14; Rogers v. Peck, 199 U. S. 425, 434, 50 L. Ed. 256, 260, 26 S. Ct. 87; Maxwell v. Dow, 176 U. S. 581, 604, 44 L. Ed. 597, 606, 20 S. Ct. 448, 494; Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292; Frank v. Mangum, 237 U. S. 309, 326, 59 L. Ed. 969, 979, 35 S. Ct. 582; Powell v. Alabama, 287 U. S. 45, 67, 77 L. Ed. 158, 169, 53 S. Ct. 55, 84 A. L. R. 527. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 484, supra; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. Ed. 667, 667, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. Ed. 961, 964, 43 S. Ct. 589. Indictments by a grand jury may give way to informations by a public officer. Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292, supra; Gaines v. Washington, 277 U. S. 81, 86, 72 L. Ed. 793, 795, 48 S. Ct. 468. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a wit-

ness for the state. Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14, supra; Powell v. Alabama, supra (287 U. S. 68, 71, 77 L. Ed. 170, 171, 53 S. Ct. 55); Homes v. Conway, 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681. Cf. Blackmer v. United States, 284 U. S. 421, 440, 76 L. Ed. 375, 384, 52 S. Ct. 252."

Elsewhere in the opinion the court said (p. 684 of 78 L. Ed.):

"The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' Owenbey v. Morgan, supra (256 U. S. p. 110, 65 L. Ed. 845, 41 S. Ct. 433, 17 A. L. R. 873)."

And still later in the opinion (p. 868 of 78 L. Ed.) the court said:

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an oppor-

tunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged semper ubique et ab omnibus (Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt - - that discredit will even touch the great immunities assured by the Fourteenth Amendment - - if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In the same opinion, the following language is found in the dissent of Mr. Justice Roberts (p. 689 of 78 L. Ed.):

"The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affects property or liberty or life, the Fourteenth Amend-

ment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing. Though the usual and customary forms of procedure be disregarded, it safeguards the defendant's substantial rights."

In *Palko* v. *Connecticut*, 302 U. S. 319; 58 Sup. Ct. 149, 82 L. Ed. 288, the court said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that *neither liberty nor justice would exist if they were sacrificed.* Twining v. New Jersey, supra (211 U. S., p. 99, 53 L. Ed. 106, 29 S. Ct. 14)."

CONCLUSION.

Petitioner has presented nothing new in his instant application for a writ of certiorari, the same issues having been determined several times before by both the Nebraska and Federal courts, and for this reason alone the District Court of Lancaster County, Nebraska, was justified in denying the application for the writ. The court found as an additional basis for denying the writ that the petition failed to state sufficient facts to warrant the issuance of the writ. In this finding, they were also

correct, as has been disclosed by our review herein of the allegations of the petition.

None of the charges set forth in the petition disclose a lack of jurisdiction on the part of the trial court or a violation of any constitutional rights which would deprive the court of jurisdiction. No federal question is therefore involved which may be considered by this court.

It is apparent that this petition is another of the numerous, meritless applications made by the petitioner for the sole purpose of harassing the courts and law enforcement officials. To sustain petitioner will be making the writ of habeas corpus an instrument of oppression instead of an instrument of liberty. The application for a writ of certiorari should be denied.

Respectfully submitted,

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For Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1945.

Henry Hawk, Petitioner, *vs.* Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.	On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[November 13, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court dismissing a petition for habeas corpus to inquire into petitioner's detention for want of merit and failure to state a cause of action. 14 S. C. J. 24 (Neb.); *Hawk* v. *Olson*, 16 N. W. 2d 181.[1] Petitioner was in the penitentiary after conviction for murder. The writ was granted because a substantial federal question as to restraint without due process of law under the Fourteenth Amendment seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no response was filed or evidence received in the district court, we accept as true all well pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree. *Lisenba* v. *California*, 314 U. S. 219, 237; *White* v. *Ragen*, 324 U. S. 760.

[1] The opinion of the Supreme Court of Nebraska does not deal with an alternate ground of the district court judgment. This was that previous petitions for habeas corpus had "fully and finally adjudicated" the present issues. Compare Salinger v. Loisel, 265 U. S. 224, 230; Ex parte Hawk, 321 U. S. 114, 118. We do not consider this issue.

The following reported cases show the efforts of petitioner to secure release. There are other proceedings not reported. Hawk v. O'Grady, 137 Neb. 639 (appeal from denial of writ in state District Court), cert. den. 311 U. S. 645; Hawk v. Olson, 130 F. 2d 910 (appeal from denial of writ in District Court), cert. den. 317 U. S. 697; 318 U. S. 746 (original); 321 U. S. 114 (original).

In its opinion the Supreme Court of Nebraska carefully considers a number of claims of denial of due process. It is said that some of the grounds for release are pleaded in the form of conclusions and that Nebraska procedure requires in habeas corpus proceedings that the applicant must set forth the facts from which it must appear that he will be entitled to discharge. *Hawk* v. *Olson*, 16 N. W. 2d 181, 183, r.c. We assume, since such grounds appear in the petition, that one of these pretermitted grounds is that "Conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and the Trial Court." See *Ex parte Hawk*, 321 U. S. 114, 116. Whatever Nebraska may require in the way of further specification may be furnished, if available, and permissible under the law of Nebraska (see *Hawk* v. *Olson*, *supra*, 183, r.c), by petitioner on a new hearing. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 487. On the issues of the sufficiency of the evidence and the interference with the right of appeal, we accept the decision of Nebraska that the first cannot be raised by habeas corpus (*Hawk* v. *Olson*, 16 N. W. 2d 181, 183) and that the second is not supported by the facts stated by petitioner.[2] Other objections to the judgment have been made which are not discussed herein but which we have looked into and which we do not consider merit further attention.

Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell* v. *Alabama*, 287 U. S. 45, 58; *House* v. *Mayo*, 324 U. S. 42, 46; compare *White* v. *Ragen*, 324 U. S. 760, 764.

Since *Frank* v. *Mangum*, 237 U. S. 309, 331, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution," even though the events which were alleged to infringe did not

[2] Lack of counsel and wrongful withholding by judicial officers of the necessary record form the substance of this claim. The opinion of the Supreme Court of Nebraska disposes of this by pointing out that petitioner never alleged a request to the Public Defender for assistance on appeal and that a mandamus [for the record] was denied. We assume the denial was proper as petitioner makes no complaint as to it. On the present record the failure to seek review from the conviction was without excuse. 16 N. W. 2d 181, 184.

appear upon the face of the record of his conviction. This opportunity for an examination into the "very truth and substance of the causes of his detention" was said in the *Frank* case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, Chap. XXVIII.[3] The legislation enlarged for the federal courts the "bare legal review" of the authority under which a petitioner was held which had been previously afforded by habeas corpus.[4] *Johnson* v. *Zerbst*, 304 U. S. 458, 465-67. See also *In re Neagle*, 135 U. S. 1, 69-76; *McNally* v. *Hill*, *Warden*, 293 U. S. 131.

This liberalization of habeas corpus required federal courts, when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process. *Frank* v. *Mangum*, *supra*, 331, 335, dissent 347. The power was called into play a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, the trial would not support a conviction. *Moore* v. *Dempsey*, 261 U. S. 86. In *Mooney* v. *Holohan*, 294 U. S. 103, 112, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment.

When the absence of counsel at a trial was urged as a ground for a federal writ of habeas corpus, we held that in federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the services of an attorney unless he has intelligently

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[3] This statute was reenacted as R. S. §§ 752-761. The provision now appears in 28 U. S. C. § 453:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is . . . in custody in violation of the Constitution or of a law or treaty of the United States; . . ."

The section had its origin in a bill [No. 605] reported by the Judiciary Committee of the House in response to a resolution directing that committee to inquire and report to the House by bill or otherwise "what legislation is necessary to enable the courts of the United States . . . to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." See Cong. Globe, 39th Cong., 1st Sess., 87, 4151. The debates on the bill in the House and Senate, while mostly concerned with incidental matters, indicated that jurisdiction to issue the writ of habeas corpus was not intended to be limited merely to violations of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 4150, 4151, 4229; Cong. Globe, 39th Cong., 2d Sess., 730, 790.

[4] See Ex parte Watkins, 3 Pet. 193, 202, cited in the Frank case, and 4 Bacon's Abridgement 563, *et seq.*, Johnson Edition 1856; XIV Viner's Abridgement, (2d Ed.), 212(D) and 217(F)(2).

waived that privilege. *Johnson* v. *Zerbst*, *supra*, 467-68; *Walker* v. *Johnston*, 312 U. S. 275, 286. The same is true in instances of coercion. *Waley* v. *Johnston*, 316 U. S. 101, 104.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, *Smith* v. *O'Grady*, 312 U. S. 329, 334, or, after refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, *Williams* v. *Kaiser*, 323 U. S. 472, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See *Tomkins* v. *Missouri*, 323 U. S. 485; *Cochran* v. *Kansas*, 316 U. S. 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. *Powell* v. *Alabama*, *supra*, 52, 58; *House* v. *Mayo*, 324 U. S. 42. Compare *Ex parte Hawk*, 321 U. S. 114; *Glasser* v. *United States*, 315 U. S. 60, 69-70. When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen*, 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. *Williams* v. *Kaiser*, 323 U. S. 472; *Tomkins* v. *Missouri*, *supra*.

Petitioner, a layman, set out the following allegations in his petition. On March 16, 1936, at 4:15 p.m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p.m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, "... at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty,"[5] and "forthwith moved the Trial Court orally for a con-

[5] Petitioner does not allege whether or not he had previously received a copy of the charge in conformity with the requirement of Revised Statutes of Nebraska § 29-1802 which provides that: "Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned

tinuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three Jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (wednesday), 1936." Petitioner claimed the protection of the Fourteenth Amendment. The record is either silent on or not inconsistent with anything material in these allegations. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 487. There is no allegation or suggestion of ignorance of or unfamiliarity with procedural or substantive law or sub-normal mentality.

These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague. The charge upon which petitioner was convicted was murder in the first degree. He had no advice of counsel prior to the calling of the jury. His motion for continuance to examine the charge and consult counsel was made without assistance. Homicide has degrees in Nebraska. Comp. Stat. Neb. 1929, § 28-401 to § 28-403. There are difficulties in the application of the rules. *In re Application of Cole*, 103 Neb. 802, 805; *Bourne* v. *State*, 116 Neb. 141. The defendant needs counsel and counsel needs time. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 488.

As the Supreme Court of Nebraska considered the motion for continuance on the merits,[6] no question of state procedure for the reexamination of criminal convictions arises. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due

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or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Section 29-1604 makes this section applicable to an information."

[6] Hawk v. Olson, 16 N. W. 2d 181, 184.

process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.

Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires. This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts. The evidence may show that the charge was served upon petitioner well in advance of the trial (see note 5, *supra*) and that he had ample opportunity to consult with counsel and secure any needed witnesses. He may have intelligently waived his constitutional rights. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 275.

Petitioner carries the burden in a collateral attack on a judgment.[7] He must prove his allegations but he is entitled to an opportunity.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[7] Johnson *v.* Zerbst, 304 U. S. 458, 468; Walker *v.* Johnson, 312 U. S. 275, 286; Williams *v.* Kaiser, 323 U. S. 472, 474.